STATE OF MICHIGAN

IN THE SUPREME COURT

DENISE FOWLER as Next Friend of
VIRGINIA JANE RAWLUSZKI,

Plaintiff-Appellee,

vs.

MENARD, INC.,

Defendant-Appellant,

and

DALE PAUL VAN WERT and LISA GINGERICH,

Defendants.

Supreme Court Docket No. 147323

Court of Appeals Docket No. 310890

L.C. File No. 11-3317-NO-JS
Hon. Joseph K. Sheeran

DEFENDANT-APPELLANT MENARD, INC.'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF ORDER APPEALED AND RELIEF REQUESTED

Defendant-Appellant Menard, Inc. seeks leave to appeal the Court of Appeals' September 15, 2015 unpublished decision. The Court of Appeals, in a 2-1 decision, affirmed the decision of the Trial Court denying Defendant-Appellant's Motion for Summary Disposition. This Court has jurisdiction over this timely application pursuant to MCR 7.301(A)(2). This case involves legal principles of major significance to the state's jurisprudence and conflicts with another decision of the Court of Appeals. As the Honorable Kurtis T. Wilder set forth in his dissenting opinion, *Richardson v Rockwood Center, LLC*, 275 Mich App 244; 737 NW2d 801 (2007) held that the "lack of signs or other traffic control devices or markings do not constitute a 'special aspect' that would remove a case from the application of the open and obvious doctrine." Plaintiff-Appellant's entire claim is based on the lack of a traffic control sign in Defendant Menard, Inc.'s parking lot. The Court of Appeals has in its present decision imposed a duty for an open and obvious condition which it previously said did not exist. The application of the open and obvious doctrine in premises liability cases is a legal principle of major significance to the state's jurisprudence. The circumstances of this case are far reaching and affect virtually every business and parking lot in Michigan. Moreover, Defendant-Appellant would submit that the Court of Appeals' opinion creates bad policy. As such, this application satisfies the criteria for review under MCR 7.302(B). Defendant-Appellant requests, for the reasons more fully set forth in this application, that this Court grant the application and, by full consideration or peremptory order, reverse the decision of the Court of Appeals and direct entry of summary disposition in favor of Defendant-Appellant.

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STATEMENT OF QUESTION PRESENTED

WHETHER A PARKING LOT CROSSWALK IS NOT A "SPECIAL ASPECT" MAKING THE PARKING LOT UNREASONABLY DANGEROUS SO AS TO AVOID THE OPEN AND OBVIOUS DANGER DOCTRINE IN A PREMISES LIABILITY ACTION INVOLVING A VEHICLE/PEDESTRIAN ACCIDENT?

Defendant-Appellant answers, "Yes."

Plaintiff-Appellee answers, "No."

The Trial Court answers, "No."

The Court of Appeals answers, "No, in a 2-1 decision."

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CONCISE STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Introduction

This case involves significant legal principles worthy of review. The issue of duty is a hallmark aspect of this state's tort law. Duty is an issue of law for the courts. In those cases in which the courts have examined the duty of a premises owner in parking lot vehicle accidents, the condition was open and obvious and no duty was owed. Cars in a parking lot are open and obvious. Yellow crosshatching in a parking lot is open and obvious. Plaintiff alleges Defendant's crosswalk lacks a stop sign. *Richardson v Rockwood Center, LLC,* 275 Mich App 244; 737 NW2d 801 (2007) held that the lack of signs or other traffic control devices or markings does not constitute a "special aspect" which would remove a case from the application of the open and obvious danger doctrine. The Court of Appeals, however, in its 2-1 decision disagrees, imposing a duty on Defendant for the lack of signs. As reflected in the Court of Appeals' dissent in this case, the majority opinion conflicts with *Richardson, supra*. The Court of Appeals' majority opinion also applies an analysis that has not been adopted and was contrary to the decision in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710; 737 NW2d 179 (2007). Moreover, the decision penalizes premises owners who provide some measure of protection, while freeing those who take no such measures. This is an issue which affects nearly every commercial property owner in this state. Defendant-Appellant requests review of its application of this significant issue be granted.

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Brief Factual Background

Virginia Rawluszki was shopping at the Bay City Menards' location on the morning of February 23, 2011. **[Docket Entry 1]** It was approximately 10:30 a.m. when she completed her shopping and exited the store, proceeding to her vehicle, which was parked in the parking lot.

Ms. Rawluszki was pushing her cart toward her vehicle through a crosswalk area. This is a spot in the parking lot which is marked with yellow crosshatching. She was nearly through the entire crosswalk area when Co-defendant Dale Van Wert was approaching, driving a 1998 Chevrolet pick-up truck. **[Docket Entry 1]** He was driving toward the front of the store and proceeded to veer to the left to head in an easterly direction. He did not proceed to make a normal left-hand turn but "cut short," if you will, proceeding through an unoccupied handicap parking space and struck Ms. Rawluszki. Discovery showed Co-defendant Van Wert could not see and did not see Ms. Rawluszki due to the sun being in his eyes. **[Docket Entry 19, Defendant's Motion and Brief for Summary Disposition]** The Sheriff's Department was contacted, which conducted an investigation, and EMS was summoned to the scene to attend to Ms. Rawluszki.

The investigating officer obtained photographs of the accident scene. **[These photographs are attached as Exhibit 3 to Defendant's Motion for Summary Disposition – Docket Entry 19]** The photographs show that there were no obstructions preventing either party from observing the conditions of the parking lot, including approaching vehicles. Co-defendant's vehicle is shown in what would be the improper lane for someone making a left turn. The parking lot itself is a typical rectangular-shaped parking lot with angular parking and lanes in between the parking spaces and

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along the front of the building. Also, the photographs show some parking spaces along the front of the building.

Procedural Circumstances

Plaintiff filed the Complaint initially on May 3, 2011. **[Docket Entry 1]** The Complaint was later amended on January 24, 2012 to assert claims against Lisa Gingerich, only, who was determined to be the owner of the vehicle. **[Docket Entry 15]** The amendment did not change the allegations as to Defendant Menard, Inc. Co-defendants Van Wert and Gingerich settled their claims and were dismissed from this action on May 21, 2012. **[Docket Entry 40]**

Plaintiff's claims against Defendant Menard, Inc., assert that the parking lot was unreasonably dangerous due to the lack of warnings, markings and signage, including a failure to erect "stop" signs. **[Docket Entry 1, Paragraph 25]** Defendant filed a Motion for Summary Disposition. Plaintiff filed a response. On April 4, 2012, oral argument was held on the motion. The Court issued an opinion from the bench denying Defendant's Motion for Summary Disposition, per the May 3, 2012, order. **(Trial Court Hearing Transcript)** The Trial Court's decision essentially adopted a policy which penalizes premises owners who provide some measures, as opposed to those who take no such measures. The Trial Court's order allowed suit to be maintained on a theory that the safety measures are less effective than they could or should have been, a theory that this Court rejected in *Scott v Harper Recreation, Inc*, 444 Mich 441, 452; 506 NW2d 857, 863 (1993).

On May 22, 2012, Defendant filed a Motion for Reconsideration. The Court denied this motion, per its May 29, 2012 order.

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The Trial Court recognized the significance of this issue in the law and to the parties. Consequently, in connection with the Order Denying Defendant's Motion for Summary Disposition, the Trial Court also stayed the proceedings to allow the issue to be decided by the appellate courts. Defendant sought leave to appeal in the Court of Appeals. (**Defendant's Application for Leave to Appeal, June 16, 2012**) On May 16, 2013, the Court of Appeals issued an order denying Defendant's application for leave for failure to persuade the Court of the need for immediate appellate review. (**Court of Appeals' Order, May 16, 2013**) Defendant sought leave of this Court on or about June 26, 2013. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, this Court remanded the case to the Court of Appeals for consideration as on leave granted. *Rawluszki v Menard, Inc*, 495 Mich 897; 839 NW2d 205 (2013). On remand, the Court of Appeals heard argument on July 16, 2014. On September 15, 2015, the Court of Appeals issued its unpublished decision. (**See Exhibit A**) The majority, the Honorable Cynthia Stevens and Amy Ronanye Krause, affirmed the decision of the Trial Court imposing a duty for the open and obvious conditions. The Honorable Kurtis Wilder dissented, noting that *Richardson* controls and no special aspect exists. The condition at issue is common in parking lots throughout Michigan, which are open and obvious. Due to the significance of this issue and the Court of Appeals' decision's conflict with published case law, Defendant-Appellant now seeks leave of this Court to address this issue.

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ARGUMENT

A PARKING LOT CROSSWALK IS NOT A "SPECIAL ASPECT" MAKING THE PARKING LOT UNREASONABLY DANGEROUS, SO AS TO AVOID THE OPEN AND OBVIOUS DANGER DOCTRINE IN A PREMISES LIABILITY ACTION INVOLVING A VEHICLE/PEDESTRIAN ACCIDENT.

The risk of being struck by a vehicle in a parking lot is open and obvious. The lack of signs or other traffic control devices do not constitute special aspects that remove the case from the application of the open and obvious doctrine. The existence of a painted crosswalk area is not a special aspect making the parking lot unreasonably dangerous. The decision in *Richardson v Rockwood Center, LLC*, 275 Mich App 244; 737 NW2d 801 (2007) is factually and legally on point. In *Richardson*, the Court concluded:

> ... a person pushing a shopping cart across a vehicle's path is a rather obvious "sign" that the vehicle should stop and yield to the pedestrian. Equally obvious is that a pedestrian in a parking lot should look both ways before crossing the driving lane to ensure that he or she is not about to be struck by a vehicle. ... we would also note the very basic premise that a driver who cannot see should stop the vehicle. Plaintiff points to no special aspect of this parking lot that prevented him from seeing the moving vehicle, prevented the driver from seeing him, or prevented the driver from stopping her vehicle when she was unable to see. Thus, to the extent that the parking lot presented a danger, that danger was open and obvious.

Likewise, the *Richardson* court noted that it is typical for parking lots outside a business to lack signs or other traffic controls:

> The lack of signs or other traffic control devices or markings does not constitute a "special aspect" that would remove this case from an application of the open and obvious doctrine. *Richardson, supra* at page 249.

The Court of Appeals' decision in this case imposing a duty for the open and obvious condition that existed is erroneous and conflicts with the decision in *Richardson*. The decision of

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the Court of Appeals' majority should be reversed, and reasoning of the dissenting opinion by Judge Wilder should be adopted.

Standard of Review

Whether a defendant owes a duty to a particular plaintiff is a question of law that is reviewed *de novo*. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157; 809 NW2d 553 (2011). The standard of review concerning a grant or denial of summary disposition is *de novo*. *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012).

Premises Liability Principles

The legal duty owed is a significant aspect of this state's jurisprudence. It is the primary aspect of a negligence action and represents the linchpin of the cause of action. If there is no duty, analysis of the conduct is not required. This case implicates the duty issue. The lower court's decision conflicts with the established law and policies.

It has long been held that premises owners are not insurers guaranteeing the safety of every person who comes onto their land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). With regard to invitees, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land. *Hoffner, supra.* The court in *Hoffner* went on to state:

> Perfection is neither practicable nor required by the law, and "[u]nder ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary [conditions] 'foolproof'". *Id* at page 460.

The possessor of land owes no duty to protect or warn of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard which

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the invitee may then take reasonable measures to avoid. *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992); *Hoffner, supra*. The open and obvious doctrine is an integral part of the definition of the premises owner's duty. *Hoffner, supra;* see also *Dascola v YMCA of Lansing*, 490 Mich 899; 804 NW2d 558 (2011) (Young, CJ, concurring). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002). A common or expected condition is not uniquely dangerous. *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995).

A limited exception to the lack of duty owed for an open and obvious hazard exists when special aspects of a condition make an open and obvious risk unreasonable. In *Lugo*, this Court explained how to determine the existence of a special aspect:

> In considering whether a condition presents such a uniquely dangerous potential for severe harm as to constitute a "special aspect" and to avoid barring liability in the ordinary manner of an open and obvious danger, it is important to maintain the proper perspective, which is to consider the risk posed by the condition *a priori*, that is, before the incident involved in a particular case. It would, for example, be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm. ... [The law] does not allow the imposition of liability merely because a particular open and obvious condition has some potential for severe harm. Obviously, the mere ability to imagine that a condition could result in severe harm under highly unlikely circumstances does not mean that such harm is reasonably foreseeable. However, we believe that it would be unreasonable for us to fail to recognize that unusual open and obvious conditions could exist that are unreasonably dangerous because they present an extremely high risk of severe harm to an invitee who fails to avoid the risk in circumstances where there is no sensible reason for such an inordinate risk of severe harm to be presented. *Lugo,* at 518, note 2.

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In *Hoffner, supra*, this Court noted the narrow nature of *Lugo's* special aspects exception, stating:

> Under this limited exception, liability may be imposed only for an "unusual" open and obvious condition that is "unreasonably dangerous" because it "present[s] an extremely high risk of severe harm to an invitee" in circumstances where there is "no sensible reason for such an inordinate risk of severe harm to be presented."

This Court in *Hoffner* further recognized that neither a common condition, nor an avoidable condition, is uniquely dangerous.

The courts have also recognized that generally a premises owner has no duty with respect to criminal acts of third parties. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988). Additionally, suits may not be maintained on the theory that the safety measures provided are less effective than they could or should have been. *Scott v Harper Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993).

Open and Obvious Condition

There can be no dispute that the conditions in this case were open and obvious. Cars in a parking lot and a painted crosswalk are such common everyday conditions that an average person with ordinary intelligence would be able to discover upon casual inspection. There is nothing presented in this case that on casual inspection the crosswalk could not be observed, nor the vehicle approaching, or other vehicles moving in the parking lot. This is a rather basic, straightforward parking lot. It does not contain any elements that make it stand out from any other parking lot. There are no islands and the lanes are straight. There is nothing unique about this particular parking lot. Instead, it is simply a common, elementary, store parking lot.

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Similarly, the crosswalk is nothing unique or uncommon. It is a yellow, crosshatched area located at the entrance and exit of the store. It is painted on the ground and noticeable to anyone on casual inspection. There is nothing about the painted crosswalk which would result in any confusion as to what it is.

In *Dascola, supra,* Justice Young in his concurrence indicated that the majority of the Court of Appeals' conclusion that a question of fact exists regarding whether soap residue in a shower presents an open and obvious danger is "quite frankly, flabbergasting." On that recognition, it would be perplexing to think that the dangers from the moving vehicles and crosswalk in this case were not open and obvious. As such, the only conclusion to be drawn is that the conditions presenting Ms. Rawluszki were open and obvious. No duty is, therefore, owed.

Once it is determined that the condition is open and obvious and no duty is owed, liability can only arise if there are "special aspects." It is incumbent on Plaintiff to establish the narrow exception. Remember, neither a common condition, nor an avoidable condition, is a special aspect. The decision in *Richardson*, *supra,* provides both a legally and factually analogous situation to the present case.

In *Richardson*, the plaintiff was leaving a store located in a shopping center. As plaintiff left the store and proceeded through the traffic lanes in front of the store toward the parking spaces, he was struck by a vehicle. The driver of that vehicle indicated she did not see plaintiff because the sun was in her eyes. This is the identical situation in the present case. Plaintiff in *Richardson* filed suit asserting that the parking lot was unreasonably dangerous as it lacked signs or other traffic control devices or markings. Defendant argued that it owed no duty, as the risks were open and

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obvious, and there were no special aspects to the parking lot which would remove it from the open and obvious doctrine. The trial court denied defendant summary disposition. Leave to appeal was granted, and the decision was reversed and summary disposition granted in favor of defendant.

Significantly, in their decision, the court in *Richardson* noted:

> ... "it is typical for parking lots outside businesses to lack signs or other traffic controls." ... A common condition is not uniquely dangerous and, therefore, does not give rise to an unreasonable risk of harm. *Kenny, supra.* Further, the hazards posed to pedestrians by motor vehicles moving through parking lots, getting into parking spaces, and backing out of parking spaces is open and obvious upon the most casual inspection by an average pedestrian of ordinary intelligence. The lack of signs or other traffic control devices or markings does not constitute a "special aspect" that would remove this case from an application of the open and obvious danger doctrine. *At* page 249.

The *Richardson* decision went on to conclude:

> In sum, a person pushing a shopping cart across a vehicle's path is a rather obvious 'sign' that the vehicle should stop and yield to the pedestrian. Equally obvious is that a pedestrian in a parking lot should look both ways before crossing the driving lane to ensure that he or she is not about to be struck by a vehicle. ... we would also note the very basic premise that a driver who cannot see should stop the vehicle. Plaintiff points to no special aspect of this parking lot that prevented him from seeing the moving vehicle, prevented the driver from seeing him, or prevented the driver from stopping her vehicle when she was unable to see. Thus, to the extent that the parking lot presented a danger, that danger was open and obvious. Accordingly, the trial court erred when it failed to grant summary disposition based on an application of the open and obvious danger doctrine.

The reasoning and findings of the *Richardson* court should control the decision in this case. Plaintiff presented nothing about this parking lot which prevented her from seeing the approaching vehicle, the driver of the vehicle from seeing Plaintiff, or stopping the vehicle when Co-defendant became unable to see. As the *Richardson* decision noted:

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> The lack of signs or other traffic control devices or markings does not constitute a "special aspect" that would remove this case from an application of the open and obvious danger doctrine.

As such, Plaintiff cannot prevail as a matter of law on any allegations that Defendant is liable for not erecting stop signs or other such allegations relating to the lack of any signs, traffic control devices, or markings. Yet, that is the claim Plaintiff has been allowed to pursue.

We also know from *Lugo* that vehicles being driven in a parking lot are not unusual. The court in that case stated:

> ... there is certainly nothing "unusual" about vehicles being driven in a parking lot, and, accordingly, this is not a factor that removes this case from the open and obvious danger doctrine.

We also know that distractions are not sufficient to create "special aspects." In *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710; 737 NW2d 179 (2007), the court held that distractions are not sufficient to prevent application of the open and obvious danger doctrine. In that case, the plaintiff argued that the displays in merchandise in the defendant's supermarket distracted her from seeing the grape residue on the floor which caused her to fall and sustain injury. The court noted from *Lugo* that if cars moving in a parking lot are not unusual, then merchandise in a store, likewise, is not anything unusual. In that same respect, there is nothing unusual about this painted crosswalk in the Menard parking lot. It could not have been a distraction sufficient to create a "special aspect."

We know from the cases similar to this one that the situation does not involve an unreasonable risk of harm. Interestingly, both of those cases, *Richardson, supra,* and *Kirejczyk v Hall*, unpublished Court of Appeals' decision No. 233708 (2002), resulted in decisions favoring the

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defendant, applying the open and obvious doctrine and dismissing plaintiff's claims. We also know that the appellate courts have reviewed numerous cases involving steps. There has not been one case in which the premises owner has been subjected to liability because he painted the steps. Likewise, the existence of a painted crosswalk in a parking lot should not be considered a "special aspect" to remove a case from the application of the open and obvious doctrine.

We also know that this case does not involve a situation which was effectively unavoidable. There are areas in the parking lot without a crosswalk such that Ms. Rawluszki could have exited the store and proceeded to her vehicle without entering the crosswalk. Moreover, she could have exited the store and waited to make sure there were no vehicles moving in and/or around the area and direction she chose to proceed. If the rule is going to be that pedestrians and vehicles sharing space in a parking lot is effectively unavoidable so as to avoid application of the open and obvious doctrine, then the exception will have swallowed the rule. In every such pedestrian/vehicle incident, a plaintiff will be able to contend that the open and obvious doctrine does not apply because the plaintiff in some fashion has been "pushed" into vehicle travel. This is contrary not only to the existing law, but is bad policy.

Erroneous Analysis by Court of Appeals

It is important to remember there is no claim that the yellow crosshatched crosswalk in and of itself was defective. There is no assertion that the paint color was improper, *i.e.* should have been white, red, or some other color. There is no assertion that using a crosshatched pattern was improper, *i.e.* should have been a ladder type. There is no assertion that the size of the crosswalk was not appropriate. Plaintiff's only assertion is that it lacked a stop sign. The appellate courts

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have already resolved this issue in *Richardson*. The Court of Appeals' majority in the present case does not attempt to distinguish the precedent, but merely acknowledges it, and proceeds to apply a different analysis. This analysis omits important and critical factors.

In *Lugo*, this Court provided some guidance on when a special aspect may exist sufficient to impose a duty relative to an open and obvious condition. Those two circumstances involved an unavoidable condition, such as a puddle of water at the only exit to a building, or a continuous danger, such as an unguarded 30-foot pit. These are very narrow exceptions. *Hoffner, supra*. This case does not involve an unavoidable condition. The Court of Appeals' majority focused on the condition being continuous similar to that of the unguarded 30-foot pit. This, however, is not accurate.

The unguarded 30-foot pit presents a danger every time it is encountered. The same cannot be said of the crosswalk. A person can proceed through the crosswalk without encountering any risk. In fact, everyone who used this crosswalk before this occasion did so without injury. The risk only arises when the negligent or intentional acts of a third party are involved. By definition, there is no continuous hazard.

The cases relied on by the Court of Appeals' majority do not take into account the same situation presented here. Yet, in those cases where the appellate courts consider actions of third parties, no duty was observed. See *Williams v Cunningham Drug Store, supra*, and its progeny. This is true even though the premises owner took affirmative steps. Recall, in *Williams*, the property owner undertook an affirmative act providing security in a parking lot.

Similarly, in *Tame v A L Damman Co*, 177 Mich App 453; 442 NW2d 679 (1989), the Court

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of Appeals did not impose a duty on a premises owner who provided security in a parking lot. Plaintiff alleged defendant voluntarily assumed a duty by supplying security and was required to exercise reasonable care in the discharge of that duty. Plaintiff's argument was rejected. The Court of Appeals' majority in the present case decided to impose a duty.

In reviewing those various cases, even though there was voluntary action by the premises owner, a duty was not imposed. As in the present case, the simple action of providing a crosswalk should not rise to the level of imposing a greater duty.

It is also significant to note that the Court of Appeals' reliance on *Jaworski v Great Scott Supermarkets, Inc*, 403 Mich 689; 272 NW2d 518 (1978) is not applicable. As recognized in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710; 737 NW2d 179 (2007), the appellate court noted *Jaworski* was a contributory negligence case. The issue was not whether the defendant supermarket owed plaintiff a duty. It is, therefore, inapplicable.

Likewise, the Court of Appeals' majority relied on *Quinto v Woodward Detroit CVS, LLC*, 305 Mich App 73; 850 NW2d 642 (2014). However, it was admittedly acknowledged that the analysis applied in that case was contrary to the analysis in *Kennedy, supra*, which the court in *Quinto* was bound to follow. Arguably, the analysis applied in *Quinto* is dicta, and does not provide a basis to impose a duty. As recognized by the court in *Kennedy*, the inquiry was not merely whether plaintiff was distracted, but whether there was anything "unusual" about the distraction that would preclude application of the open and obvious danger. In this case, there is nothing unusual about Defendant's crosswalk. As *Lugo* recognized, moving vehicles in a parking lot are not unusual.

The Court of Appeals' majority's opinion in this case has not been accepted. The current

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state of the law as applied to parking lot cases is set forth in *Richardson*. The Court of Appeals' majority in the present case chose to ignore that precedent and apply its own analysis, which is contrary to existing law.

Bad Public Policy

The Court of Appeals' decision in this case has set up bad public policy. Crosswalks provide identification and warnings for pedestrians and vehicle drivers of areas where their paths intersect. There are obvious safety advantages to crosswalks and identification of these intersecting areas. A decision that the existence of a crosswalk creates a "special aspect" exposing a premises owner to liability, which does not otherwise exist without a crosswalk, will result in a premises owner to refrain from providing any warnings or safety measures in a parking lot. In essence, it forces the premises owner into an "all or nothing" type situation. A premises owner who acts will always be under scrutiny that something more or different could or should have been done. He is forced into making the premises "foolproof" or "injury proof," amounting to strict liability.

Accepting the decision of the Court of Appeals' majority results in zones of liability within a parking lot. For example, Defendant is exposed to liability for a pedestrian/vehicle accident in a crosswalk, but no liability if the accident occurs outside the crosswalk area. In this case, had the impact occurred probably less than four feet to the pedestrian's left, the crosswalk would not have been an issue and Defendant would not be in this position.

In essence, Defendant is being punished for taking action. However, the courts have rejected imposing liability when such circumstances exist. In *Scott v Harper Recreation, Inc, supra*, the court noted that suits may not be maintained on a theory that the safety measures are less

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effective than they could or should have been. Similarly, in *Tame v A L Damman Co*, 177 Mich App 453; 442 NW2d 679 (1989), the court declined to adopt a policy that imposes liability when such policy would penalize merchants who provide some measure of protection, as opposed to those who take no such measures.

That is precisely Plaintiff's argument in this case. While there was a crosswalk present, Plaintiff argues that this was less effective and more should have been done.

The absurdity continues when one considers this in the context of the duty relative to third parties. We know from *Williams, supra*, and its progeny, a premises owner ordinarily is not responsible for the criminal acts of third persons. Therefore, let us assume that the Co-defendant driver had a vendetta against Ms. Rawluszki and desired to bring harm to her. On this day, he seized the opportunity and ran her down. Under that scenario, Defendant would have no liability. Defendant has no duty to protect against the driver's criminal conduct.

However, the Co-defendant driver was cited for careless driving, a violation of the motor vehicle traffic laws, as he was driving in a manner likely to endanger any person or property. This violation is a civil infraction. MCL 257.626b. Despite essentially the same conduct, Defendant is now liable, and only because Plaintiff was standing in a crosswalk.

Keep in mind, Defendant can have a parking lot that is full of potholes and incurs no duty. Defendant's parking lot can be poorly lit or covered in ice and snow and no duty is imposed. Defendant can hire security personnel who do nothing but sleep on the job and no duty arises. However, put some stripes on a parking lot and you are now exposed to liability for the acts of a third person. No business owner would ever undertake the risk.

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The Court of Appeals' majority's decision in this case interjects bad policy that this Court has previously rejected. It makes a premises owner an insurer of the safety of its invitees. Defendant, in essence, becomes strictly liable for any injury occurring in a parking lot. Defendant would have been better off doing nothing, letting a person fend for themselves.

CONCLUSION

The open and obvious doctrine was developed to prevent precisely this type of lawsuit. A reasonably prudent person of ordinary intelligence understands what a crosswalk is and the dangers posed by vehicles in a parking lot. There were no special attributes to this parking lot that rendered it uniquely or unreasonably dangerous. Denying Defendant's Motion for Summary Disposition is contrary to the existing law and policies long established by this Court.

The issue of duty is of major significance to this state's jurisprudence. The decision to deny Defendant's Motion for Summary Disposition in the circumstances of this case has effectively altered the duty owed by a premises owner to invitees. Defendant should not be subjected to protracted and expensive litigation in a case arising from a common condition and obvious dangers.

RELIEF REQUESTED

Defendant-Appellant MENARD, INC. respectfully requests this Honorable Court grant its application and summarily reverse the Trial Court and grant Defendant-Appellant summary disposition, or, alternatively, consider the application and remand this matter to the Court of Appeals as on leave granted for decision on this issue, or other such relief as may be determined by this Court.

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